IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 14

R. J. THOMAS, *Appellant,*

vs.

H. W. COLLINS, *Sheriff of Travis County, Texas*

Appeal From the Supreme Court of the State of Texas

BRIEF FOR APPELLANT ON REARGUMENT

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas (R. 318-327) is reported at 141 Tex. 591, 174 S. W. (2d) 858. No written opinion was issued by the State District Court; its order adjudging Appellant in contempt appears in the Record at R. 308-309.

JURISDICTION

The jurisdiction of this Court is invoked under Sections 344(a) and 861(a) of the Judicial Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in our Brief in No. 569, October Term, 1943, pp. 2-5.

STATEMENT OF THE CASE

Appellant R. J. Thomas, president of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, one of the vice-presidents of the Congress of Industrial Organizations, was invited by the Oil Workers International Union, Local 1002, C.I.O., to address a mass meeting to be held on September 23, 1943, in the City of Pelly, Texas, for the purpose of organizing the employes of the Humble Oil Company (R. 5 22-23, 33, 279). On September 22, 1943, on complaint of the Attorney General in the 53rd District Court in Austin, Travis County, a distance of 167 miles from where Appellant was staying at Houston, a temporary restraining order was issued by that court, *ex parte*, to restrain Appellant from soliciting members in the Oil Workers International Union or any other labor organization affiliated with the C.I.O. without first obtaining an organizer's card "as required by law" (R. 291-295, 315-317). The order was served on Appellant at Houston, on September 23, 1943, approximately five hours prior to the meeting (R. 35). At the meeting, Appellant, without having applied for or obtained an organizer's card (R. 10, 35-37), delivered a speech in which he discussed the advantages of union membership and solicited the audience at large and one employe, Pat O'Sullivan, by name to join the Oil Workers International Union (R. 4-5, 41, 279-290).

At the close of the meeting, Appellant as well as two other speakers were arrested for soliciting members to join the Oil Workers International Union without first obtain-

ing a license as required by the Texas statute (R. 42). After further proceedings[1] the district judge found Appellant guilty of contempt of court for violation of the restraining order and rejected Appellant's contention that the Texas statute was unconstitutional (R. 299-302, 308-309).

Appellant, having been remanded to the custody of the Sheriff of Travis County, Texas, filed a petition for writ of habeas corpus in the Supreme Court of Texas, renewing his contention that the statute was unconstitutional (R. 312-314). On October 20, 1943, the Supreme Court of the State of Texas orally denied a Motion of the State to dismiss the application for the writ, grounded upon the contention that Appellant was without standing to attack the statute because he had violated the restraining order, and on October 27, 1943, the court entered its opinion and judgment, sustaining the constitutionality of the statute, denying Appellant's petition for a writ of habeas corpus and remanding Appellant to the custody of the Sheriff of Travis County (R. 318-326). On November 24, 1943, the court below denied Appellant's motion for rehearing (R. 327-366).

QUESTIONS PRESENTED

After hearing argument of this case in the October Term, 1943, this Court restored this case to the docket and assigned it for reargument this Term. Counsel were requested to discuss in their briefs the following questions:

"1. Does the Texas Act by judicial or administrative construction require a registration or license before making the speech made by Thomas—if it had omitted the O'Sullivan solicitation?

"2. Did the injunction forbid the speech (apart from O'Sullivan's solicitation) and is the order of contempt based in whole or in part on such speech? If

[1] Set forth in full in our Brief in No. 569, pp. 6-7.

not, is the speech used as an aggravation of the offense? If neither, what is the purpose and effect of its recital in the papers and orders in this proceeding?

"3. Assuming the speech to be immune and assuming the words addressed to O'Sullivan to be a violation of a valid prohibition of solicitation, what is the effect on its constitutional validity of including both in one injunction?

"4. Assuming the injunction invalid as applied to the speech, what was the duty of Thomas in respect to obedience so long as it was not set aside?

"5. Is the application of Section 5 consistent with the provisions of the National Labor Relations Act?

"6. Assuming that petitioner had a constitutional right to make a general argument and solicitation to the entire assembly of workers, should the State punish him in a single penalty because he picked out one member of the assembly and addressed a solicitation to him by name?"

Before discussing these questions, we discuss the nature of the distinction between the speech and the O'Sullivan solicitation.

I. A CONSTITUTIONAL DISTINCTION BETWEEN APPELLANT'S SPEECH AND HIS SOLICITATION OF O'SULLIVAN MAY NOT BE VALIDLY MADE.

The questions which the Court has requested Appellant to discuss seem, with two exceptions,[4] to invite exploration of a distinction between Appellant's speech to and solici-

[4] Questions No. 4 and 5. The latter question deals with the relationship of the challenged legislation to the National Labor Relations Act. We do not discuss this question here since the Government, in response to the invitation of this Court, is filing a brief *amicus curiae* dealing exclusively with this problem.

tation of his audience at large and his solicitation of O'Sullivan. We do not believe that such a distinction may be validly drawn, constitutionally or otherwise. The nature of the organizer's work and of the organizational process makes it clear that such a distinction is not a meaningful one in a consideration of the extent to which his activities enjoy constitutional protection.

A. *The Organizing Process*[8]

The conventional pattern of organizing a plant is shaped by two basic considerations. First, the value of a union must be brought home to an ever-widening circle of employes through intensive discussion and proselytizing. Second, this process must be set in motion without invoking hostile countermeasures and must mature rapidly enough to become immune to such countermeasures. The organizer must not only promote acceptance of the union but, if he is to succeed, must do so discreetly and under conditions often difficult and hazardous.

After obtaining a list of prospects from those in the plant already sympathetic with the union, the organizer visits such prospects in their homes in the evening. To each of

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[8] The description of the organizing process which appears in the text does not, of course, exhaust the various methods used in organizing employees. However, we believe it to be an accurate account of a common pattern. It is based upon the following sources: *Handbook of Trade Union Methods* (New York, 1937), pp. 5-7; Vorse, *Labor's New Millions* (New York, 1938), pp. 138-139; Hardman, ed., *American Labor Dynamics* (New York, 1928), pp. 114-115; Levinson, *Labor on the March* (New York, 1938), pp. 189, 241-242, 251; Walsh, *CIO—Industrial Unionism in Action* (New York, 1937), pp. 69-70; Weyforth, *Organizability of Labor* (Baltimore, 1917), pp. 16-17, 27-29; Brooks, *When Labor Organizes* (New Haven, 1938), pp. 1-6; *Report of R. J. Thomas*, "Automobile Unionism, 1940-1941," (Buffalo, 1941), p. 9; Pope, *Millhands and Preachers* (New Haven, 1942), pp. 239-241; Macdonald, *Labor Problems and the American Scene* (New York, 1938), pp. 476-477; Fitch, *The Causes of Industrial Unrest* (New York, 1924), p. 177; Seidman, *The Needle Trades* (New York, 1942), p. 186. For examples of the manner in which the organizing process described in the text operates in practice, see *Matter of Donnelly Garment Co.*, 53 N.L.R.B. 241, 245; *Matter of Goodyear Tire & Rubber Co.*, 21 N.L.R.B. 306, 315-362, enforced in this respect in 129 F. (2d) 450 (C.C.A. 5); *Matter of Mesta Textile Mills*, 11 N.L.R.B. 1167, enforced in 110 F. (2d) 565 (C.C.A. 5); *Matter of Agwilines, Inc.*, 2 N.L.R.B. 1, enforced in 87 F. (2d) 146 (C.C.A. 5); *Matter of Republic Steel Corp.*, 9 N.L.R.B. 219, 240, enforced in 107 F. (2d) 472 (C.C.A. 3); *Matter of Alma Mills*, 24 N.L.R.B. 1, 9-10.

these workers individually he tells the story of the union, describes conditions in the industry as a whole, compares the wage scale at the plant which he is seeking to organize with those in plants already organized. He answers questions as to the purposes and methods of the union, assures those who fear employer reprisal that they will be protected, and seeks to refute objections to the organization. Upon making it as clear as possible to each prospect that collective bargaining is more effective than individual bargaining, he seeks to have his prospect sign a pledge card or membership application.

The organizer then arranges to meet with those who have manifested an interest in the organization and who form the spearhead of the organizing campaign. The organizer again discusses with these individuals the union's program and advantages. These leading spirits perform the work of spreading the word of the union to their fellow workers and persuading them to sign up. This work is conducted so as to conceal from the employer, as far as it is possible, the existence of an organizing drive. For this reason the advanced union men conduct their activity discreetly, speaking to the men at their homes or away from the presence of their supervisors. Similarly, the organizer himself remains in the background in order not to attract attention to himself or those employes working with him, and thus generate an employer countermovement at a time when the organization is least able to resist it.

After the organizer and those acting with him have convinced a sufficient number of employes that a union is desirable, a temporary chairman is elected and a local begins to take shape. As the movement emerges organizationally, the discussions which gave rise to it become more widespread. The homes of workers, their cars, the plant yard, locker rooms, and vicinage become theatres of a continuing debate on the merits of unionism. Moreover, the debate

broadens in scope, for the emerging public character of the drive sets in motion concrete countermeasures which create new issues. The organizer and union leaders may be required, for example, to explain why an announced wage increase does not render the union superfluous, to reply to the formation of a company-sponsored rival organization or to answer personal attacks.

A point is thereby reached when the issues in the campaign are stabilized—all the reasons for joining or not joining the union which have emerged during the drive have been presented to the employes individually. At the same time the growth in the local's collective strength has made it safe to issue mass public appeals to those who have not responded to the individual appeals. Acting as an organization, it proceeds to recapitulate in a public dramatic way the arguments formerly addressed to individuals. In order to reach a large audience with the union's message, the organizer (who may have temporarily left the scene in order to initiate the organizational process elsewhere) may resort to the use of leaflets, sound trucks or mass meetings. Groups in the community whose support has been won in the cause of the campaign, such as public officials, teachers and ministers, are called upon to bring home the union's message to the employes. Officials of the union or those of other unions fraternally interested in it repeat that message at a public rally, such as the one at which Appellant spoke (R. 279–290). In short, the union exhausts the resources available to it in order to win over the reluctant or the undecided.

This entire process, from the initial furtive door to door individual appeal to the final mass campaign, depends upon basically the same technique of persuasion and discussion. No meaningful line of distinction, constitutional or otherwise, can be drawn at the point where persuasion and discussion terminate and solicitation begins. Every

argument in favor of acceptance of the union's position upon the broad and vital concerns which constitute the subject matter of its functioning is a solicitation to join it.

Because unionism involves a deep-going alteration in the worker's relationship to his job, it cannot be marketed like tooth-paste or vacuum cleaners, but must be discussed in terms of the basic public issues which it presents. A union campaign is a continuing and fluid debate and not a cinematographic series of offers and acceptances. Such discussions are an inherent aspect of the process of solicitation because employes are rarely made aware of the merits of unions through the press and other organs of opinion. Solicitation, then, of "memberships in a labor union or members for a labor union," to use the language of the statute, is a process of educating employes, of making them aware of the desirability of joining with their fellows, of overcoming prejudices and stereotypes which stand in the way of such action. We believe, for reasons already discussed at length in our Brief in No. 569, that the challenged legislation unconstitutionally interferes with this educational process.

Solicitation of membership is forwarded by the presentation of ideas in the classic constitutional sense. The desirability of collective action, the discussion of legislation and of the advantages of labor unions fall indisputably within the area of free speech. An organizing campaign is a "free trade in ideas" where the "best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams* v. *U. S.*, 250 U. S. 616, 630. These ideas do not lost constitutional standing because they are addressed to the welfare of employes, because they "trench to the point of estate."

We turn now to a consideration of the thesis that Appellant's constitutional rights turn upon the size of his audience.

B. *No Constitutional Line Can Be Drawn Between Addressing the Audience at Large and O'Sullivan, an Individual*

It should be borne in mind that the sole difference between Appellant's speech to the audience at large and his solicitation of O'Sullivan is one of numbers. At the conclusion of his address to the audience Thomas said (R. 290):

> "Therefore as Vice-President of the C.I.O. and as a union man, I earnestly ask those of you who are not now members of the Oil Workers International Union to join now. I solicit you to become a member of a union of your fellow workers and thereby join hands with labor throughout this country in all industries. . ."

The subsequent "solicitation" was addressed to O'Sullivan alone and used his name. It seems too plain for argument that in considering the scope of Appellant's right to speak and in his speech to solicit his audience to join a specified union, it is constitutionally of no significance that the right is exercised in a large audience or distributively through individual solicitations. Speech cannot be constitutionally free only when the name of its hearer remains unspoken but not when he is addressed by name, nor may constitutional rights be conjured away by a process of division.

If this Court were to hold that the O'Sullivan solicitation may stand constitutionally on a different footing from Appellant's speech, it would in effect strip the organizational process of protection from state interference precisely at the point when it most requires it. It is at the early stages of organization when the process is a prey to every hostile force in the community that this Court would cripple it with an additional restraint. This is so because this is precisely the phase of organization which is conducted on a personal, individual, door-to-door basis. At

the very time when the organizer is seeking to avoid the mistake of publicity which might make him a victim of tar and feathers, broken bones or a police frame-up,* his group of employe aides victims of discharge, and his plans for furthering the union movement vulnerable to a strategic exercise of the employer's economic power, he is required to submit to the State's prior restraint. At the point where the organizer's conduct and other civil rights, such as the right to hold a meeting, are curtailed and he depends almost exclusively on his right to speak to individuals the Court would permit that right also to be forfeited. On the other hand, when the union movement is effective and where its collective strength renders it immune to reprisal so that a public meeting is possible, then and only then would the organizer's speech become free. We believe that the Constitution is broad enough to protect from state interference not only speech at a large public meeting participated in by dignitaries, but also the initial personal appeals in workers' homes and outside the plant gates, the slow, hazardous organizing work which precedes and makes possible the speeches and rallies.

Similarly, the delays necessarily occasioned by the legislation (see our Brief in No. 569, pp. 49-57) would strike with a peculiarly effective thrust if the initial organizing process were declared subject to it. Personal solicitation uniquely characterizes the stage of the organizational process at which the organizer's access to the employes must be quick and easy. It is at this stage that the union movement is subjected to strategically-timed employer attacks. The organizer may be called upon suddenly to rally the workers and to prevent the dissipation of a union movement still insufficiently developed to survive attacks without expert guidance. A spontaneous response by workers to mass discharges may require the immediate presence of

* See the cases and materials cited in our Brief in No. 569, at p. 47.

an organizer to guide an inchoate union movement. Employes may be quickly herded by supervisors into a rival organization launched by their employer. But if the Texas statute is valid, before the organizer is free to handle such urgent situations, he must seek a license from the Secretary of State and cool his heels while the union movement collapses or is discredited.

Moreover, it is at the stage of individual solicitation that the line between the organizer and his organizing group in terms of who is paid and who is unpaid is vague and amorphous. During the early stages of the organizing campaign all of those sympathetic with the union seek to forward the drive by soliciting their friends and shopmates. If these workers were to be reimbursed by the union for the time spent in soliciting individuals, they too would be brought within the statute and compelled to register before urging their friends to join the union.

Should this Court announce that the right to solicit members for labor organizations were dependent upon the size of the audience solicited, it would not only fashion a distinction which has no rational basis, but would in effect permit a right to lose constitutional significance at the precise point where its unencumbered exercise is indispensable to reach and change the minds of men.

C. *A Constitutional Distinction May Not Be Drawn Between the Speech and Solicitation in Terms of Their Content*

The line between O'Sullivan, an individual, and the remainder of the audience, a large number of individuals, fades as soon as it is drawn. May the speech and the solicitation support any other constitutionally valid distinction? Even if it were assumed that the speech itself did not contain the solicitation at its conclusion, quoted above (*supra*, p. 9), no constitutional distinction between the

speech and the O'Sullivan solicitation could be drawn. We do not believe that for constitutional purposes advocacy in behalf of a specified labor union may be separated from a request to join it. Appellant's speech, apart from its explicit solicitation at the close, is, we submit, an indisputable appeal, request and solicitation to join the Oil Workers International Union.

Thus, he announced at the outset of his speech (R. 281) that he would describe the benefits of C.I.O. unions, and that he intended "to ask them to join the Oil Workers International Union." He stated that the purpose of organizing the oil industry was to raise the standard of living of the employes, to give them effective voice in the affairs of government, to increase production, that oil workers had joined the union for the same reason that doctors and lawyers had organized. He stressed the importance of affiliation with the C.I.O., elaborated the grievances which were the concern of the union (R. 283), the improved conditions which it offered, the character of the employer interests opposed to the union (*id.*), the contributions of unions to war production, the relationship of the wage structure of one industry to that of another, and the importance of united action (R. 283–290). All of this was spoken at an organizing rally sponsored by prominent union organizers (R. 279).

If language has meaning, each member of Appellant's audience was solicited in the most urgent and unmistakable way to join the Oil Workers Union. It is true, as we have assumed for purposes of this discussion, that the formula, "I solicit you to join the Oil Workers International Union" is absent from Appellant's speech. However, if such a formula were substituted for the speech, its invitation to join, its directive thrust, would be far less urgent.

Hence, since the Constitution deals with realities and

not abstractions, if the statute is unconstitutional in its application to the speech, its validity is not saved by confining it to the solicitation. Any other view would elevate the ritualism of a verbal formula to the level of a constitutional distinction which clear and simple meaning denies.

Trade unionism is not a compendium of abstract principles but a program of group action. Moreover, it is a program which presents to workingmen and women concrete, vital, irreconcilable choices.[5] To suggest that this program may be forwarded and constitutionally protected so long as allegiance is enlisted but not when affiliation is sought, so long as sympathy is promoted but not membership, would be to allow the right of free speech to function in a vacuum. Free speech would not be the precious right it is if the constitutional shield were withdrawn from it at the point where it confronts men with a practical choice in the realm of conduct. Cf. *Abrams* v. *United States*, 250 U. S. 616, 630. In the context of labor relations, the distinction between advocacy and solicitation is not one of kind and, indeed, scarcely one of degree. It is assuredly a distinction without constitutional dimension. If the right to speak in behalf of a union is to be freely exercised, it must include the right to solicit membership therein. Fair exercise of the former right necessarily involves the latter.[6]

Moreover, the living content of the right which such a distinction would protect is vague and indefinite. Would an organizer be required to register if he urged the merits of a particular union, but not if he praised unions gen-

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[5] *Gompers* v. *United States*, 233 U. S. 604, 610.

[6] See *J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332.

[7] Compare the right to proselytize as an aspect of religious freedom. *Martin* v. *City of Struthers*, 319 U. S. 141. This is not to suggest that the right to proselytize is constitutionally indistinguishable from the right to solicit. Each civil right functions constitutionally through forms appropriate to its purpose and history. Cf. *Gompers* v. *United States*, 233 U. S. 604, 610. We do contend, however, that purpose and history link solicitation and speech as intimately as proselytization and the practice of religion.

erally? Would he be required to register if he voiced a broad appeal to support the union's organizing drive but was careful not to particularize the manner in which such support was to be forthcoming, if he praised the union's achievements and the advantages of membership but at no time requested his audience to join? Would speech otherwise constitutionally protected become subject to the state's restraint because uttered during an organizing campaign? Would the same be true if uttered during a campaign to obtain designation as a collective bargaining representative? Would an unregistered organizer be placed in default under the statute if he urged that his hearers make the X plant a union plant or Y town a union town? Would union literature, otherwise immune, subject its issuer to the statute because it was subscribed with the name and address of the union? Would the great body of union campaign literature which deals with specific issues of wages, hours and working conditions, which offers a bread-and-butter inducement to join but no specific invitation, constitute solicitation of membership within the meaning of the statute?

In short, whether the statute is interpreted, on the one hand, as placing a taboo only on the formula, "I solicit you to join the X union" or, on the other hand, as including within its scope speech reasonably calculated to induce men to become members of a union, it cannot be constitutionally sustained. Cf. *Stromberg* v. *California*, 283 U. S. 359, 369; *Herndon* v. *Lowry*, 301 U. S. 242, 258–259.

The verb "to solicit," which is used in the challenged statute, asks profound constitutional questions in the area of free speech. This is so even where the conduct solicited is criminal.[*] The object of the solicitation restrained by the State of Texas is not criminal conduct but the forma-

[*] Chafee, *Free Speech in the United States* (Cambridge, 1941), pp. 23, 44, 46-49, 81-82, 115, 145, 152-153, 171.

tion of labor organizations. This Court and Congress have made clear that formation of labor organizations is to be encouraged in the public interest, that the right to form them "is a fundamental right." *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. The formation of labor unions is not only a basic federal right,[9] but it is one which has plain constitutional status.

The process of group formation in the public interest, of which the organization of trade unions is perhaps the most vigorous example of our time, is the fulfillment of democracy. It is the exercise to the fullest extent of the r nt of freedom of speech, freedom of the press, freedom of petition and freedom of assembly. In the formation of a labor organization the exercise of these rights are directed in an integrated way to winning the minds of men to the acceptance of the idea of collective rather than individual disposition of problems arising out of the employment relationship. Solicitation of members for a labor organization is an aspect of that integrated exercise of liberties involved in group formation. When such solicitation is undertaken by a paid organizer, it remains an exercise of constitutional liberty and is not suddenly converted into a commercial transaction or an exchange of goods for money. The challenged legislation interferes with "the essential attributes of that liberty."[10] Traditionally in the United States groups formed in the public interest have nourished and renewed the roots of our democracy.[11] The processes whereby such

[9] See the Government's Brief *amicus curiae*.

[10] *Near* v. *Minnesota*, 283 U. S. 697, 708.

[11] The unique contributions of voluntary associations, other than political parties, to the formation and strengthening of democratic processes and institutions in the United States has been the subject of frequent comment. On the significance of groups in American life, see Schlesinger, *The Rise of the City—1878-1898* (New York, 1933), pp. 409-410; Bryce, *The American Commonwealth* (New York, 1910), p. 294; de Tocqueville, *Democracy in America* (New York, 1900), pp. 114-118. On the vital role played by voluntary groups in the founding of the American republic, see Van Tyne, *The Causes of the War of Independence* (Boston, 1922), pp. 373, 374-376, 427-428 (Committees of Correspondence).

On the contributions of groups and voluntary associations in particular fields, see Race Relations:

Hobbs, *The Antislavery Impulse* (New York, 1933); McMaster, *History of*

groups are formed should be jealously kept free of restraint. Compare *U. S. v. Carolene Products*, 304 U. S. 144, 152. This is particularly urgent where formation of labor organizations is involved, since such organizations exist and function for the express purpose of exercising constitutional rights (Brief, pp. 21–26).

II. THE COURT'S QUESTIONS.

Question No. 1

Does the Texas Act by judicial or administrative construction require a registration or license before making the speech made by Thomas—if it had omitted the O'Sullivan solicitation?

At the outset it should be pointed out that the Act on its face makes no distinction between soliciting a single individual by name and soliciting an audience at large. Section 5 of the Act merely states that the organizer must

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the People of the United States (New York, 1895), Vol. II, p. 21; Myrdal, *An American Dilemma* (New York, 1944), Vol. II, pp. 810-857.

Peace Movements:
Curti, *American Peace Crusade* (Durham, N. C., 1929); Schlesinger, *The Rise of the City* (New York, 1933), pp. 365-366.

Economic Relations:
Hinds, *American Communities and Cooperative Colonies* (Chicago, 1908); Noyes, *History of American Socialisms* (Philadelphia, 1870); Adams, ed., *History of Cooperation in the United States*, Vol. VI, Johns Hopkins Studies in Historical and Political Science (Baltimore, 1888).

Women's Rights:
Schlesinger, *New Viewpoints in American History* (New York, 1926), pp. 126-160.

Public Schools and Adult Education:
Curti, *The Growth of American Thought* (New York, 1943), pp. 349-352, 596-597; Post, *Popular Free Thought in America* (New York, 1943), p. 87.

Land Reform and Colonization:
Zahler, *Eastern Workingmen and National Land Policy* (New York, 1941); McMaster, *op. cit.*, Vol. VI, p. 109.

Agricultural Associations:
Oberholtzer, *A History of the United States Since the Civil War* (New York, 1926), Vol. III, pp. 102-109; Hicks, *The Populist Revolt* (Minneapolis, 1931).

Humanitarian and Related Movements:
Fish, *Rise of the Common Man* (New York, 1927), pp. 259-260; Stewart, *The National Civil Service Reform League* (Austin, Tex., 1929); Nevins, *The Emergence of Modern America* (New York, 1927), p. 334; McCrea, *The Humane Movement* (New York, 1910).

obtain a license "before soliciting any members for his organization." The fact that no restrictive limitation distinguishing the speech from the solicitation is present in the statute seems evident from Section 2(c) of the statute. This Section defines organizer to mean "any person who for a pecuniary or financial consideration solicits memberships in a labor union or members for a labor union."

The sole clue which the record affords with respect to the administrative construction of the statute is contained in the position of the Attorney General's office at various stages of the litigation. This, we believe, is of some significance since the Attorney General is the attorney for the administrative offices of government (R. 78; cf. *Ex parte Texas*, 315 U. S. 8).

In the state's petition for injunction the Attorney General set forth as the basis for an injunction (R. 292):

> "*That the defendant is scheduled to speak* at a mass meeting to be held at the City Hall in Pelly, Harris County, Texas, on Thursday night, September 23, 1943, and that at said meeting the defendant will solicit memberships in a labor union and members for a labor union. . . . The defendant has publicly announced the intention of *addressing said mass meeting and soliciting those present . . .*"
>
> "The plaintiff further shows that *there is not sufficient time before defendant makes the threatened speech* for a notice to be served on him. . ." [Italics supplied.]

In the State's Motion for contempt, it was urged by the Attorney General as ground for holding Appellant in contempt (R. 297-298):

> "At said time and place said R. J. Thomas in violation of the Court's order did openly and publicly solicit an audience of approximately 300 persons . . . to then and there join and become members of said Oil Workers International Union."
>
> ". . . the acts of R. J. Thomas above alleged were in

> open and flagrant violation of the order of this court and the writ issued pursuant thereto. . ."

It seems clear from the above statements that the Attorney General is of the view that the statute does in fact require "a registration or license before making the speech made by Thomas," even if Thomas had omitted the O'Sullivan solicitation. It is fair therefore to assume that the Secretary of State will administer the statute pursuant to such interpretation.

Moreover, the district court so construed the statute in issuing its injunction as to include the mass solicitation. (R. 294, 304.) It thus described Appellant's violation of the injunction (R. 318):

> "Thereafter the relator, who was a paid representative of the union, violated the terms of the injunction by soliciting *members* for said union. . ." [Italics supplied.]

In view of the fact that the Attorney General in his Brief submitted to the court below had stated that one of the grounds of the contempt was the O'Sullivan solicitation, it seems correct to say that this was not "a casual and unconsidered use of the plural." *Pollock* v. *Williams*, 322 U. S. 4, 23.

We therefore submit that Question No. 1 must be answered in the affirmative. Any suggestion that the scope of the statute is confined to the O'Sullivan solicitation finds no support in the proceedings which plainly reflect the judgment "of the state as a whole" that the statute forbids the speech. Cf. *Rippey* v. *Texas*, 193 U. S. 504, 509; *Missouri* v. *Dockery*, 191 U. S. 165, 171.

Question No. 2

Did the injunction forbid the speech (apart from O'Sullivan's solicitation) and is the order of contempt based in

whole or in part on such speech? If not, is the speech used as an aggravation of the offense? If neither, what is the purpose and effect of its recital in the papers and orders in this proceeding?

1. Did the injunction forbid the speech?

The petition which gave rise to the injunction alleged in support of its issuance (R. 292) that,

> ". . . defendant is scheduled to speak at a mass meeting to be held at the City Hall in Pelly, Harris County, on Thursday night, September 23, 1943, and that at said meeting the defendant will solicit memberships in a labor union and members for a labor union. . . The defendant has publicly announced his intention of addressing said mass meeting. . ."

The basis upon which the Attorney General went to the trial court for an injunction was therefore clearly the "threatened speech" which Thomas proposed to deliver.

Upon this allegation in the State's petition the court granted an injunction in the following language (R. 294):

> "It is therefore, Ordered, Adjudged and decreed that R. J. Thomas be and is hereby restrained and enjoined from soliciting memberships in Local Union No. 112 of the O.W.I.U., and members for Local Union No. 1002 of the O.W.I.U. and from soliciting members in any other labor union affiliated with the C.I.O. while said defendant is in Texas without first obtaining an organizer's card as required by law."

It seems plain that the injunction was not confined to the individual solicitation but included the speech. This is clear not only from the face of the injunction but the allegations of the petition:

> "The writ should be construed in the light of the allegations of the petition, the subject matter of the suit, and the objects therein sought." *Nystel* v. *Thomas*, 42 S.W. (2d) 168, 172 (Tex.).

2. Is the order of contempt based in whole or in part on such speech?

The answer to this question must necessarily be an affirmative one. The petition for injunction based itself upon the speech (*supra*, p. 19). The State's Motion for contempt (R. 297) alleges not only the O'Sullivan solicitation but also, in a separately numbered paragraph, the public solicitation "of an audience of approximately 300 persons . . . all employees of the Humble Oil & Refining Company's plant at Bay Town" as an "open and flagrant violation of an order of" the court.

Evidence adduced at the contempt hearing to show Appellant's violation of the order included a verbatim copy of the speech, and only incidentally the direct solicitation of O'Sullivan (R. 4–5, 279–290). While the order of contempt does not specifically find the speech to be an act of contempt, any suggestion that the speech formed no basis for it can only be an afterthought, for the speech unifies and forms the dominant content of the petition for injunction, the Motion for contempt and the evidence offered at the contempt hearing. See *Nystel* v. *Thomas*, *supra*.

Question No. 3

Assuming the speech to be immune and assuming the words addressed to O'Sullivan to be a violation of a valid prohibition of solicitation, what is the effect on its constitutional validity of including both in one injunction?

We believe that the answer to this question must be that both the statute and the injunction are unconstitutional. The speech and the solicitation derive from precisely the same section and sentence in the statute. Since the statute has been authoritatively construed to restrain both (*supra*, pp. 16-19), the statute cannot now be redrafted to address itself to a field of conduct which is narrower than that

which its authors contemplated. Nor is this an academic consideration, for it would manifestly require a precise draftsmanship and a clearly articulated intent to differentiate speech which is constitutionally protected from a solicitation emerging from it which is not. Compare *Jones* v. *City of Opelika*, 319 U. S. 103, reversing 316 U. S. 584; *Thornhill* v. *Alabama*, 310 U. S. 88, 97; *Stromberg* v. *California*, 283 U. S. 359, 368; *Williams* v. *North Carolina*, 317 U. S. 287, 292.

The injunction is in terms of and exhausts the statute. They both must be given a like construction, and since the statute is unconstitutional, the injunction is not saved because as an abstract matter it contains a restraint which might be validly issued should the legislature deem it wise to do so.

Moreover, whether or not the Court's assumption (*supra*) leaves standing a restraint which may be fairly attributable to the legislative purpose, it is plain that the injunction itself may not now be validly confined to a non-Federal subject matter. Since the entire proceeding embraced both the speech and solicitation and there is now no way of knowing whether the injunction would have issued, and indeed, whether the Attorney General would have sought it in the first instance, if he had not assumed that the speech were enjoinable under the Constitution, the injunction must in its entirety be held unconstitutional. Any other view gives standing to the State's afterthoughts and countenances a serious impairment of Appellant's constitutional rights. See cases cited, *supra*.

Question No. 4

Assuming the injunction invalid as applied to the speech, what was the duty of Thomas in respect to obedience so long as it was not set aside?

The circumstances under which the injunction was issued and violated throw some light upon the propriety of Appellant's conduct with respect to the injunction. Appellant had been invited by the Oil Workers International Union, Local 1002, to address a meeting on the evening of September 23, 1943, at the City of Pelly, Texas (R. 5, 279). The meeting was conducted as part of a campaign to organize the employes of the Humble Oil Company, located in the adjoining community of Baytown (R. 5, 279). The focus of this organizing campaign, conducted in the teeth of strong company resistance,[11] was a proceeding then pending before the National Labor Relations Board for an election (R. 33–34). To further this campaign, Appellant accepted the invitation to speak and journeyed from his home in Detroit, Michigan, for that purpose (R. 22–23, 33).

On September 22, shortly after Appellant arrived at Houston, the Attorney General of Texas, upon the basis of newspaper accounts that Appellant was scheduled to speak at the meeting the following day, filed a complaint in the 53rd District Court in Austin, Travis County, a distance of 167 miles from Houston, Harris County, seeking a temporary restraining order and temporary and permanent injunction to restrain Appellant from soliciting members in any C.I.O. union without first obtaining an organizer's card (R. 291–294). Judge Gardner of the Travis County District Court issued, *ex parte*, a temporary restraining order enjoining Appellant while in the State of Texas from soliciting members in the Oil Workers International Union or any other labor organization without first obtaining an organizer's card and also issued an order that Appellant appear before him on September 25, 1943.

[11] See *Matter of Humble Oil & Refining Co.*, 16 N.L.R.B. 112, 114-115, 116-134, enforced as modified in 113 F. (2d) 85 (C.C.A. 5); *Matter of Humble Oil & Refining Co.*, 48 N.L.R.B. 118, enforced in 140 F. (2d) 777 (C.C.A. 5); *Matter of Humble Oil & Refining Co.*, 53 N.L.R.B. 116, 120, n. 7.

two days after the scheduled meeting, to show cause why a temporary injunction should not issue (R. 294–295, 315–317). The temporary restraining order and the order to show cause were served on Appellant approximately five hours prior to the scheduled meeting (R. 35).

Appellant decided to deliver his speech as planned not only because of his conviction that both the Constitution and the National Labor Relations Act protected his right to make it, but also because preparations for the meeting had already been made and the Attorney General had taken the position that an earlier action to enjoin enforcement of the statute was improperly brought (R. 36, 48–72, 75–78).

We believe that under these circumstances Appellant properly refused to be muzzled (compare *Lovell* v. *Griffin*, 316 U. S. 452, 453; *Jones* v. *City of Opelika*, 319 U. S. 103, reversing 316 U. S. 584) and that only a mechanical application of the doctrine restricting collateral attack upon injunctions would place Appellant in default.[11] We must remember that we are dealing with labor relations which have a highly perishable *status quo*. If Appellant were required to abide by the injunction and to test his constitutional rights by direct appeal, the occasion for their exercise would have entirely disappeared. Compare Frankfurter and Greene, *The Labor Injunction* (New York, 1930), Appendix II.

Insofar as the Court's question with respect to Appellant's duties under the injunction is directed to his status to raise the constitutional issues involved here, it need only be pointed out that the Supreme Court of Texas refused to hold that Appellant had lost his right to urge the unconstitutionality of the Act because he had violated an injunction. Compare *Cooper Company* v. *Los Angeles Building Trades*

[11] That rigid application of this doctrine is unwise in this field, see "Collateral Attacks Upon Labor Injunctions," 47 Yale L. J. 1136.

Council, et al, 15 Labor Relations Reporter 46, decided August 21, 1944 (Cal. Sup. Ct.) Although the Attorney General urged upon that court that Appellant's contumaciousness deprived him of standing to raise the constitutional question in a Motion to dismiss the application for writ of habeas corpus, the court overruled such Motion.[17] Since restrictions upon collateral attacks upon injunctions as applied to judgments of courts in the same judicial system reflect a pragmatic local view of the needs of an orderly system of administering justice,[18] we submit that the judgment of the Supreme Court of Texas in this respect should be followed. Since that court did not think that Appellant was disabled to raise the constitutional question involved in this proceeding, we need not consider the consequences of his contumaciousness under other circumstances. See *Yakus* v. *United States*, 64 S. Ct. 660.

Question No. 6[19]

Assuming that petitioner had a constitutional right to make a general argument and solicitation to the entire assembly of workers, should the State punish him in a single penalty because he picked out one member of the assembly and addressed a solicitation to him by name?

This question has already been fully treated (*supra*, pp. 4-16). It is sufficient to repeat here that constitutional rights to free speech cannot be made to turn upon whether the hearer is addressed by name or the number of hearers addressed.

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[17] Both the Motion to dismiss and the Order overruling the Motion to dismiss are unprinted (See p. III).

[18] The considerations underlying such a view were thoroughly canvassed in a Brief submitted by the Attorney General in support of its Motion to dismiss the application for writ of habeas corpus. The attack upon Appellant's standing to raise his objections to the legislation has apparently been abandoned by the Attorney General in this Court.

[19] Discussion of Question No. 5 is omitted, see *supra*, p. 4, note 2.

CONCLUSION

The organizer, made familiar by years of horrendous propaganda as the "outside agitator," has in the past been a favored target of the lawless state. Access to the minds of employes has been, frequently and in many areas, denied him or granted by the state upon such terms as to make it valueless. The process of keeping alive and expanding such access is one which functions through the constitutional guarantees. Few groups have suffered the invasion of such guarantees more consistently than trade union organizers."

The challenged legislation is not an isolated phenomenon. It is a part of a body of legislation, greatly influenced by wartime emotions, which seeks to revive in new forms the historic attacks upon organizers and trade unions, to burden and cripple the constitutional mechanisms of access."

Appellant's objection to the challenged legislation is neither formal nor abstract. The statute, while clothed in the ill-fitting garb of an occupational registration to prevent fraud (compare *Pollock* v. *Williams*, 332 U. S. 4), virtually suppresses a right. This is so both because it destroys anonymity, which is vital to its exercise, and enmeshes it with a delay fatal to its effectiveness. These are grave social and constitutional consequences not merely in the negative sense that a section of the market place of ideas has been blacked out, but also in the positive sense

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[11] See, for example, *Hague* v. *C.I.O.*, 307 U. S. 496; *Anderson* v. *United States*, 318 U. S. 350; *Bridges* v. *California*, 314 U. S. 252; cf. *Mooney* v. *Holohan*, 294 U. S. 103; see also, the cases and materials cited in our Brief in No. 569, at p. 47 and Baldwin and Randall *Civil Liberties and Industrial Conflict* (Cambridge, 1938). As the materials cited in our Brief in No. 569 indicate, organizers in Texas experience unusual difficulties in their efforts to maintain access to the industrial population. The campaign of terror against the organizers and leaders of the Oil Workers International Union attained such proportions in that State that the Union was compelled to obtain an injunction on February 25, 1942, restraining the Chief of Police of the City of Port Arthur and his subordinates from *inter alia*, "illegally arresting, threatening to arrest, harassing, beating, bruising, or intimidating" them. 10 Labor Relations Reporter, 76-77.

[12] See Dodd, *Some State Legislatures Go to War—On Labor Unions*, 29 Iowa Law Rev. 148 (1944).

that Congress has stated that the spread of such ideas should be fostered. Finally, by its grave injury to the right of organizers to speak, the challenged legislation sterilizes other civil rights which are exercised in the formation and functioning of labor organizations."[19]

Respectfully submitted,

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[19] The recent stream of statutes and ordinances purporting to regulate labor unions seems to be directed to fundamentally anti-union purposes. These measures have largely originated in areas where labor unions are weak and impotent or where the organized anti-unionism of powerful employer groups has captured control of the legislative machinery. See Dodd, *op. cit., supra*, and Owens, *A Study of Recent Labor Legislation*, 38 Ill. L. Rev. 309 (1944). In a recent report, the Senate Committee on Education and Labor (S. Rep. 398, part 5, 78th Cong. 2nd Sess., p. 1694) has warned that,

"All such proposed regulatory measures must and should be examined closely and deliberated upon carefully to make sure that under the cover of regulation in the public interest an organized anti-unionism is not foisting upon us legislation that will destroy or stifle the rights of labor that are fundamental to an economic democracy.

"We must distinguish between regulation *in the public interest and in the interest of anti-union employers*. Such insistence will result from public awareness rather than the self-imposed discipline of anti-union employers who provide the backbone of support for this type of law.

"It is our further conclusion that anti-union employer groups, which, after seven years, refuse to accept finally the principles of industrial democracy, have sought and will continue to seek to shackle the rights of labor through legislation purporting to regulate labor union activities in the public interest. It is a bold but logical tactic for those who feel constrained by a national law that protects from coercion by employers the rights of employees to organize and bargain collectively. Such tactics hold great dangers for the rights of labor and industrial democracy.

"The past decade has witnessed the march of totalitarian tyranny across the face of Europe. Its invariable accompaniment has been efforts by powerful industrial interests on political dictators alike to replace free trade-unions with state-controlled labor fronts and to restrict by State edict the rights of labor to the point of extinction. In the shadow of this unvarying pattern those who would unhesitatingly encourage the drastic curtailment and regulation of trade-unions must reckon with the risks entailed."

As this case is being considered a new wave of identically-worded ordinances has appeared in widely separated cities and towns purporting to license and regulate organizers but admittedly designed to halt organization entirely. See, for example, *Ordinance* of City of Newnan, Georgia (1944); *Ordinance* of City of Blytheville, Arkansas (1944); *Ordinance* of City of Athens, Tennessee (1944); *Ordinance* of Milledgeville, Georgia (1944).